

This Opinion is Not a
Precedent of the TTAB

Mailed: November 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re America in Harms Way
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Serial No. 87976064
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Rachel L. Pearlman of Heslin Rothenberg Farley & Mesiti P.C.
for America in Harms Way.

Michael Furda, Trademark Examining Attorney, Law Office 129,
Pamela Y. Willis, Managing Attorney.

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Before Adlin, English and Allard, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant America in Harms Way seeks a Principal Register registration for the proposed mark KEEP AMERICA GREAT! (in standard characters), for “ornamental novelty pins” in International Class 26.¹ The Examining Attorney refused registration under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that KEEP AMERICA GREAT! fails to function as a mark, because it does not indicate the source of Applicant’s goods, or identify and

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¹ Application Serial No. 87976064, a child application divided from parent application Serial No. 87315890. The parent application was filed January 27, 2017 under Section 1(b) of the Trademark Act, based on an intent to use the mark in commerce. On the same day Applicant filed its Request to Divide it also filed an Amendment to Allege Use claiming first use on September 1, 2017 for the goods in the involved child application.

distinguish them from those of others. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed.

I. The Examining Attorney’s Evidentiary Objection is Sustained

The Examining Attorney’s objection, 10 TTABVUE 3-4,² to evidence Applicant submitted for the first time with its Appeal Brief, 6 TTABVUE 87-91, is sustained. Trademark Rule 2.142(d) (“The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”).³

II. Evidence and Arguments

The Examining Attorney bases the refusal primarily on third-party use, including by the media, of KEEP AMERICA GREAT!. He contends that the phrase “has been widely used by many different sources as a political informational message to convey support for ideas espoused by Donald Trump.” 10 TTABVUE 13, 15-16; *see also*

² Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

³ Applicant cites no authority for its argument that its untimely evidence should be considered because it is “responsive to Examining Attorney’s rejection and is part of the same factual pattern discussed.” 11 TTABVUE 3 n.1. We are unaware of any. The point of Trademark Rule 2.142(d) is not to exclude relevant evidence, but rather to ensure that an applicant or examining attorney has an opportunity to rebut evidence during prosecution, prior to any appeal (when it is too late for submitting rebuttal or other evidence). “If an applicant or examining attorney wishes to introduce additional evidence after an appeal has been filed, the applicant or examining attorney may file a written request with the Board to suspend the appeal and remand the application for further examination.” TRADEMARK BOARD MANUAL OF PROCEDURE (“TBMP”) § 1207.02 (June 2023). Applicant should be aware that it was unnecessary to file Office Actions from this case with its Appeal Brief, as the application file is of record.

February 28, 2018 Office Action TSDR 2⁴ (“this term or phrase is a commonly used political message that is associated with [former] President Donald Trump’s political ideals”).

Applicant, by contrast, focuses in large part on former President Trump’s own use of, and attempts to protect, the proposed mark, as well as the related Trump campaign slogan “MAKE AMERICA GREAT AGAIN.” *See* 6 TTABVUE 10, 16-19; 11 TTABVUE 3-4, 6-8.⁵ However, Applicant does not directly grapple with the evidence that: (1) “many different sources” use the proposed mark KEEP AMERICA GREAT!; or (2) the phrase is not used only by former President Trump and his campaigns, but is also, more broadly, “associated with” him.

In any event, Applicant argues that when it “first used the mark to indicate the source of [Applicant’s] goods, the mark was not in common use.” 6 TTABVUE 7-10. It also claims to have “established itself to consumers as a source” of the identified goods, based on its use and registration of the acronym “KAG,” and the way it uses the proposed mark KEEP AMERICA GREAT! on the identified goods. *Id.* at 11-15.

A. Media Use of and Reporting on the Proposed Mark

According to a POLITICO article about the proposed mark, dated two days before President Trump took office, “Donald Trump plans to update his ubiquitous [2016]

⁴ Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, in the downloadable .pdf format.

⁵ Applicant argues in its briefs that the Trump campaign filed an application to register KEEP AMERICA GREAT!, and that the “application was expressly abandoned on June 7, 2021.” 6 TTABVUE 18; *see also* 11 TTABVUE 3-4 (“the Trump Campaign expressly abandoned the mark ‘KEEP AMERICA GREAT!’ without using it (per the file wrapper)”).

campaign slogan, ‘Make America Great Again,’ when he seeks reelection in 2020, he says, to ‘Keep America Great!’.” February 28, 2018 Office Action TSDR 9.⁶ As the then president-elect explained in an interview, he chose the proposed mark because “I am so confident that we are going to be, it is going to be so amazing ... If I was like, ambiguous about it, if I wasn’t sure about what is going to happen – the country is going to be great.” *Id.* at 14-15.

Three years later, in an article about the rally that officially launched then-President Trump’s reelection campaign, POLITICO reported that President Trump asked the crowd whether it preferred “Make America Great Again” or “Keep America Great” as the reelection campaign’s slogan, and the crowd strongly preferred “Keep America Great.”⁷ August 2, 2021 Office Action TSDR 5. Notwithstanding his requesting input from the crowd at the campaign’s launch rally, “Trump [had] tested out the new slogan in past appearances, and Keep America Great posters [had] already become a fixture at Trump rallies.” *Id.*; *see also* February 25, 2022 Office Action TSDR 11-13.

⁶ Hearsay rules do not apply in *ex parte* USPTO examination. *In re Epstein*, 32 F.3d 1559, 31 USPQ2d 1817, 1821 (Fed. Cir. 1994); *In re Jasmin Larian, LLC*, 2022 USPQ2d 290, at *22-23 (TTAB 2022); *In re Joel Embiid*, 2021 USPQ2d 577, at *2 n.19 (TTAB 2021).

⁷ We find that third-party use of “KEEP AMERICA GREAT,” without an exclamation point, is probative of public perception of “KEEP AMERICA GREAT!” with an exclamation point. Indeed, the phrase sounds identical whether it includes an exclamation point or not, looks virtually identical, and conveys the same meaning and creates the same commercial impression because the exclamation point merely emphasizes the phrase. *Cf. In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (exclamation point in TAKE 10! does not distinguish it, in appearance, sound, meaning or commercial impression, from TAKETEN); *In re Brock Residence Inns, Inc.*, 222 USPQ 920, 922 (TTAB 1984) (FOR A DAY, A WEEK, A MONTH OR MORE! for hotel services would not be perceived as a source indicator, finding that “[t]he presence of the exclamation point at the end of the designation ... serves as well to emphasize the ... informational significance of the designation”).

Former President Trump is not the only user of the proposed mark, however. According to the CBS News article “Biden Campaign Buys ‘Keep America Great’ Domain and Uses it to Take Aim at Trump,” current President Biden’s 2020 campaign purchased the “keepamericagreat.com” domain name for a website that “features what it says are promises made by Mr. Trump that were broken.” August 2, 2021 Office Action TSDR 8-9. During the 2020 Republican National Convention, Biden “tweeted out a link to the ‘Keep America Great’ website.” August 2, 2021 Office Action TSDR 10.

Use of the proposed mark is not limited to the 2020 presidential candidates. According to a “dailydot.com” article about 2020 campaign slogans, “[m]uch like ‘Make America Great Again’ (MAGA) before it, ‘Keep America Great’ (KAG) is the acronym you’ll be seeing pop up on social media as the 2020 election grows closer, but there are plenty of people already using it.” February 25, 2022 Office Action TSDR 15. For example, “plenty of people running in the 2018 midterm elections have used it as they attempt to win against what many people expect will be stiff competition from Democrats.” *Id.* at 18.

Sometimes, the media uses the proposed mark to characterize political events as opposed to just candidates. For example, the headline of an article about a Nevada political rally featuring former President Trump was “Trump Supporters Gather at Convention Center for ‘Keep America Great’ Rally”:



February 3, 2023 Denial of Request for Reconsideration TSDR 56 (highlighting added).

B. Third-Party Commercial Use of the Proposed Mark

Use of the proposed mark goes beyond just politicians and politics. In fact, numerous vendors use the proposed mark, often ornamentally, on goods. There is no indication in the record that any of them are affiliated with former President Trump or either of his campaigns. Moreover, there is no indication that the proposed mark KEEP AMERICA GREAT! is a proprietary term.

For example, the TONOS Store offers a “Donald Trump for President 2020 Keep America Great Flag Banner” on “amazon.com,” as shown below:



August 2, 2021 Office Action TSDR 12 (highlighting added). The listing also includes a “Customer questions & answers” section. The answer to the question “Is this flag made in America?” is “These are not made or sold by Trump’s Campaign. His flags are made in USA and are much higher quality. You can find them for around \$30 on his official website.” *Id.* at 19. Thus, the record indicates that TONOS Store is unaffiliated with former President Trump or his campaigns.

Similarly, Etsy offers a number of products bearing the proposed KEEP AMERICA GREAT mark sold by multiple companies, including PeerlessProducts, HomeDecorByAnatasia, DonaldTrumpStuff, BankHaus, BestCustomHomeDecor, thehometowncompany, EuiStudio, OuterBanksprt, PatriotTribe, SweetCreationzStudio, Stitchfy, ITrumpUSA, RRLGraphics, CreationsByTatumGear and KickAce, among others, none of which appear to have any affiliation with former President Trump, his campaigns, or each other, as shown below:



Etsy "keep america great"

Everyday Finds Jewelry & Accessories Clothing & Shoes Home & Living Wedding & Party Toys & Entertainment Art & Collectibles

Estimated Arrival Any time All Filters 5,265 results



Trump 2020 Keep America Great Microfleece Jac...
★★★★★ (586)
\$38.99 FREE shipping
Ad by FeelessProducts



America First Shirt, American Patriot Shirt, Gift for...
★★★★★ (371)
\$18.59 ~~\$24.79~~ (25% off)
Ad by CapellaDesignStore



Keep America Great Custom Metal Sign, Donald...
★★★★★ (1,312)
\$44.99 ~~\$49.99~~ (10% off)
Ad by HomeDecorByAnastasia
FREE shipping



President Donald Trump Hat "KEEP AMERICA GREAT"
★★★★★ (213)
\$15.89 FREE shipping
DonaldTrumpStuff



6 Donald Trump 2020 Pin Pinback Buttons 1.25" s...
★★★★★ (17)
\$6.49
BankHaus



President Donald Trump Hat "KEEP AMERICA GREAT"
★★★★★ (213)
\$13.89 FREE shipping
DonaldTrumpStuff

https://www.etsy.com/search?q=%22keep%20america%20great%22 08/02/2021 12:31:19 PM



Trump 2020 KEEP AMERICA GREAT Blue Oval ...
★★★★★ (219)
\$2.99 FREE shipping
BestCustomHomeDecor



MAGA Make America Great Again President Don...
★★★★★ (169)
\$12.99 FREE shipping
PBVDesigns
Bestseller



Trump Keep America Great Leather Patch Hat
★★★★★ (1,095)
\$26.00
thehomebarncompany



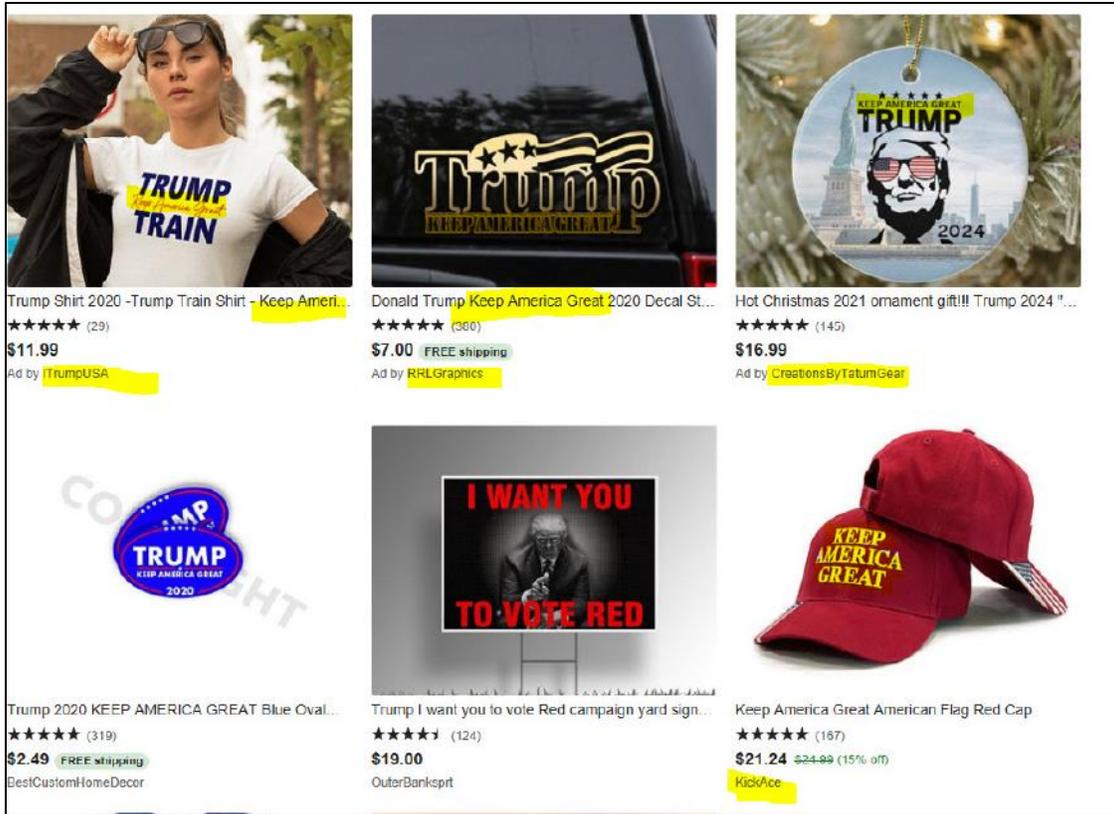
Trump 2024 Keep America Great Campaign Embro...
★★★★★ (1,919)
\$19.99 FREE shipping
EvaShedec



Trump Pence 2020 campaign yard sign Keep Am...
★★★★★ (124)
\$17.00
OuterBanksept



Keep America Great Flag - President Donald Tru...
★★★★★ (161)
\$13.95 FREE shipping
PatriotTribe



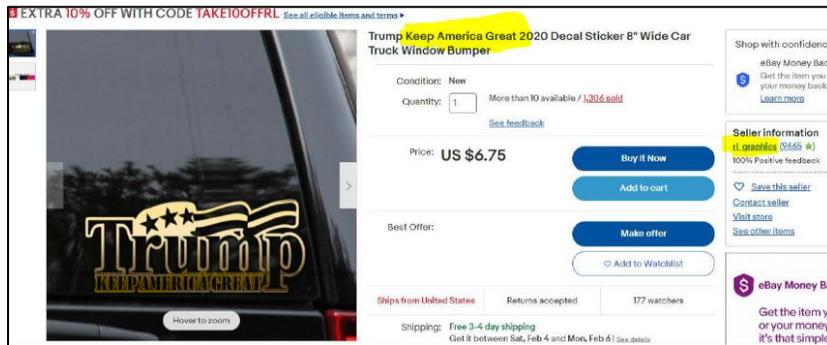
Id. at 24-27 (highlighting added). See also February 25, 2022 Office Action TSDR 8-10.

eBay seller “nanohawk” offers a red baseball cap bearing the proposed mark, as shown below:

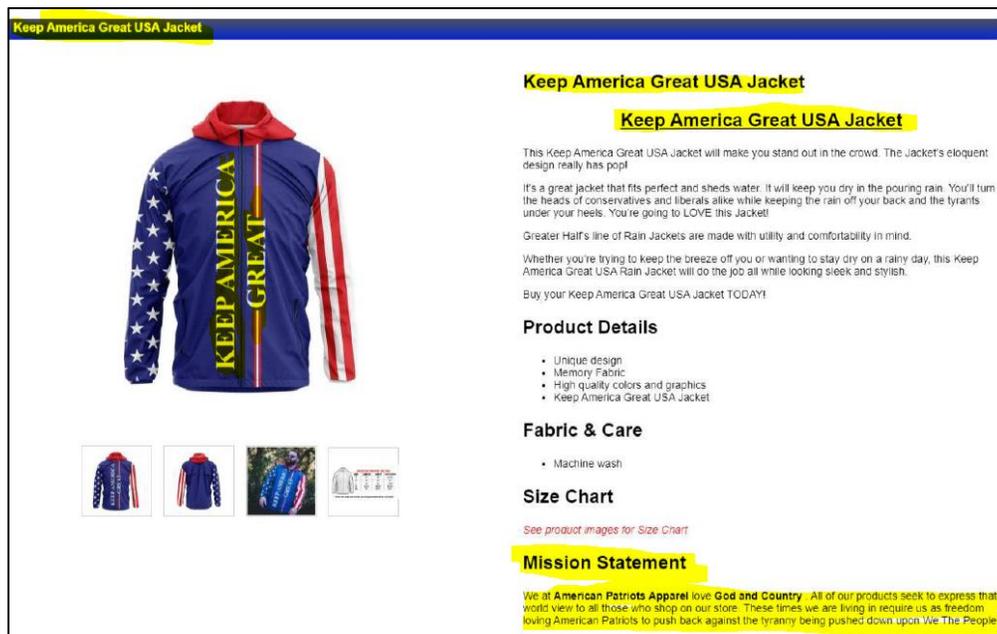


Serial No. 87976064

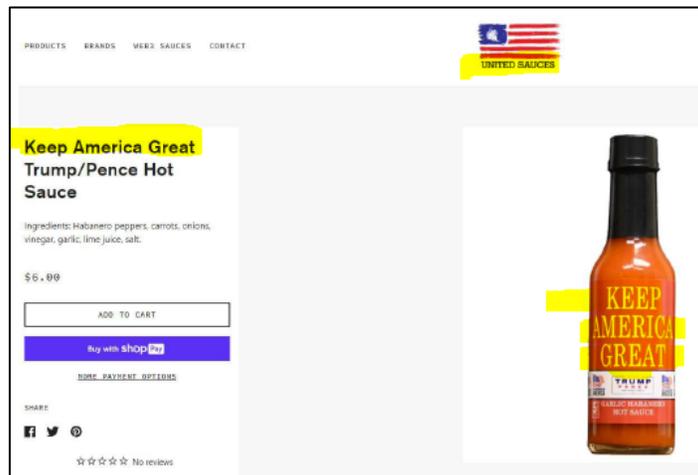
February 3, 2023 Denial of Request for Reconsideration TSDR 41 (highlighting added). The listing's "About My Company" section strongly suggests that seller "nanohawk" is unaffiliated with former President Trump or his campaigns. *Id.* at 44 ("I have been creating embroidered items since 2005. It is a one man company and embroidery is a part time business ... Each hat is embroidered to order."). Another eBay seller, "rl_graphics," offers a KEEP AMERICA GREAT decal sticker:



Id. at 46 (highlighting added). American Patriots Apparel offers a "Keep America Great USA Jacket":

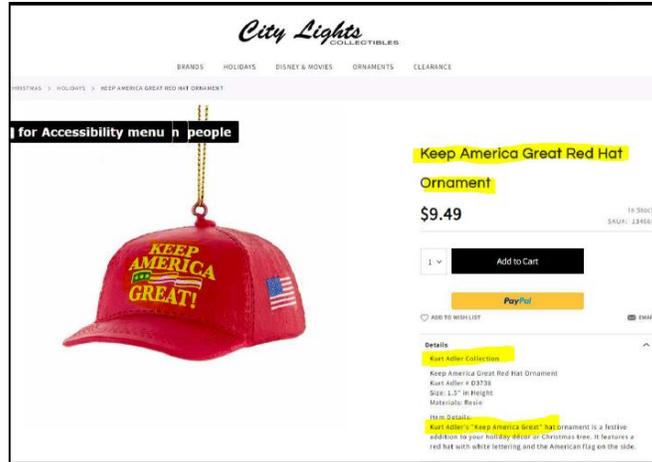


This company’s Mission Statement gives no indication of any affiliation with former President Trump or his campaigns. *Id.* at 37 (“We at **American Patriots Apparel** love **God and Country**. All of our products seek to express that world view to all those who shop on our store. These times we are living in require us as freedom loving American Patriots to push back against the tyranny being pushed down upon We The People.”). Thus, the “Keep America Great USA Jacket” displays the phrase “to express [a] world view.” *Id.* At the same time, many third-parties use the phrase to express specific support for Trump campaigns, as shown by the “Keep America Great Trump/Pence Hot Sauce” shown below:



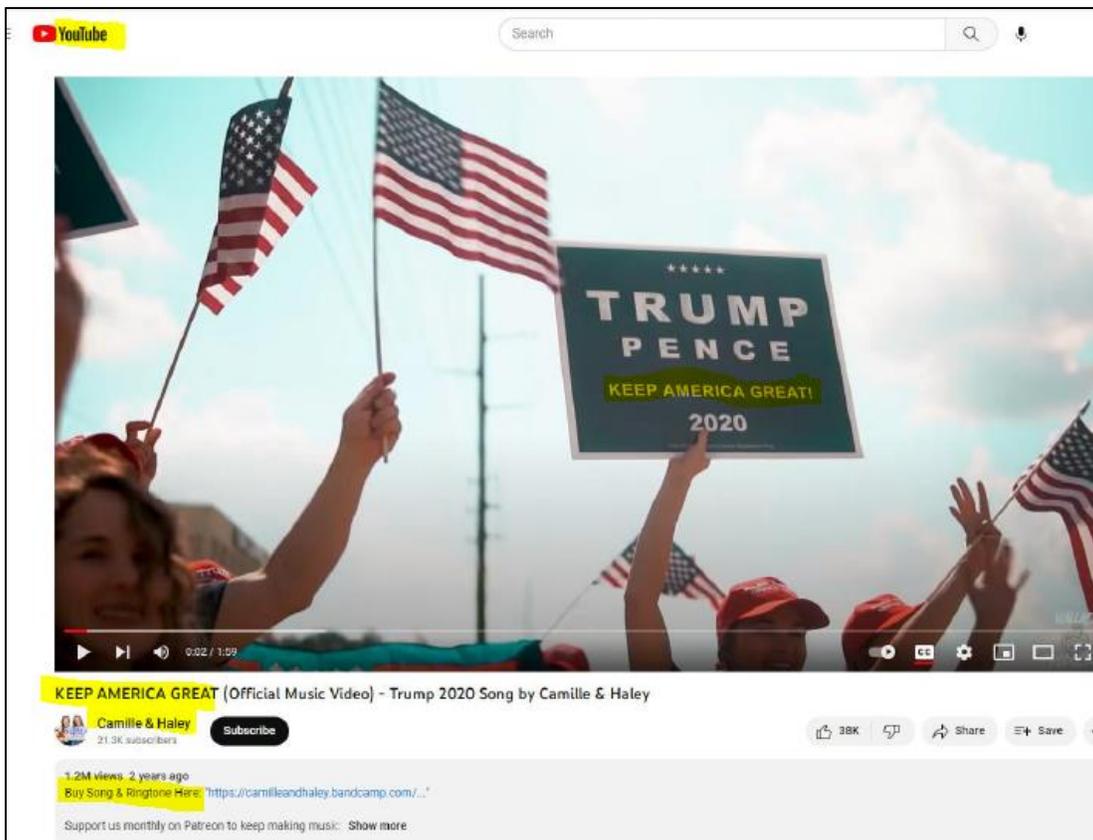
Id. at 53 (highlighting added).

City Lights Collectibles offers a “Keep America Great Red Hat Ornament” from the “Kurt Adler Collection”:

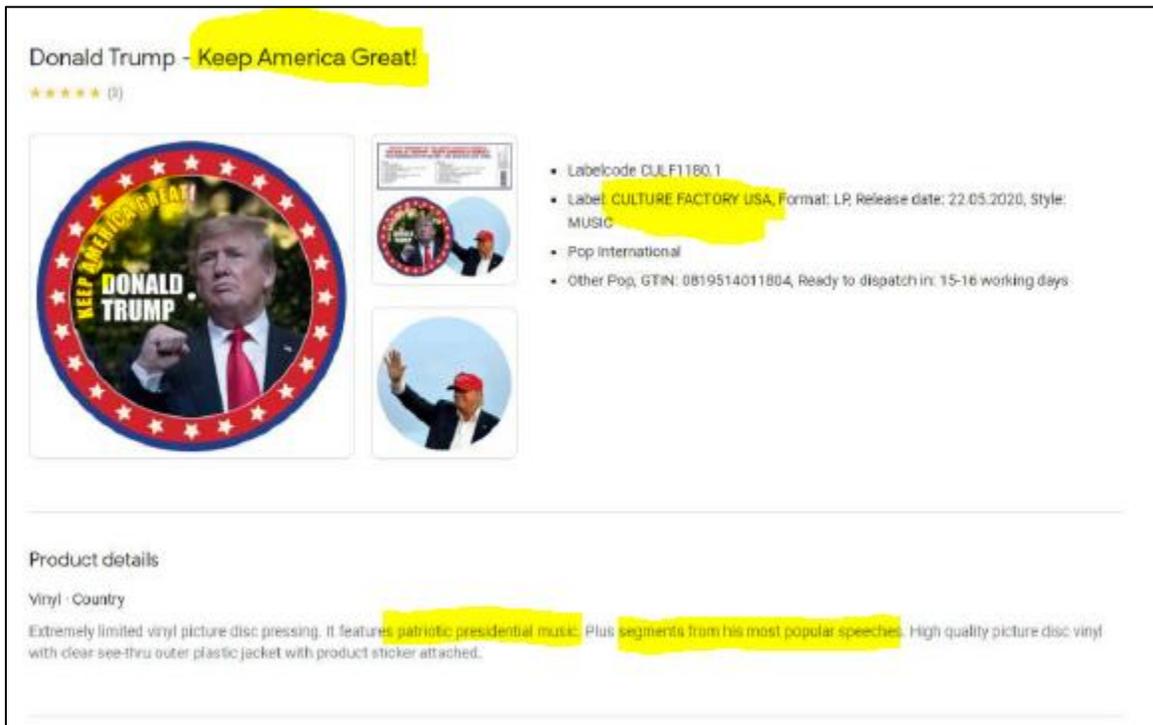


Id. at 66 (highlighting added). There is no indication that the Kurt Adler Collection has any affiliation with President Trump or his campaigns.

The musical group Camille & Haley used the proposed mark in connection with a “Trump 2020 Song” and a related music video and ringtone, as shown below:

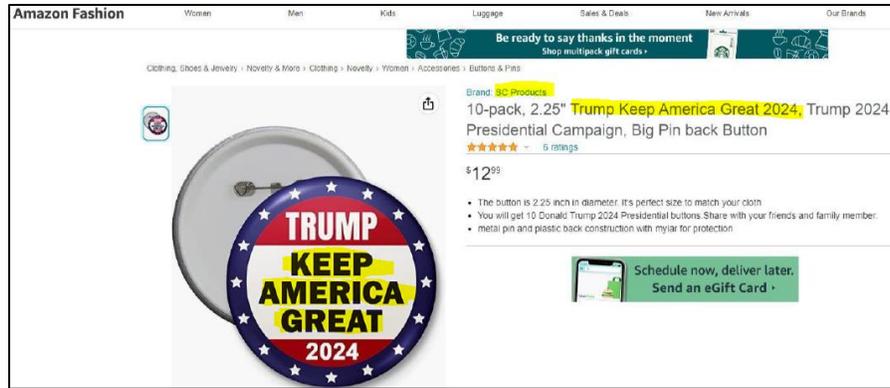


Id. at 55 (highlighting added). The group sells the song and ringtone on its own website, *id.*, which at least suggests that the group has no formal or business affiliation with former President Trump or his campaigns. The record also shows third-party commercial use of the proposed mark for vinyl records featuring “patriotic presidential music” and segments from former President Trump’s “most popular speeches”:

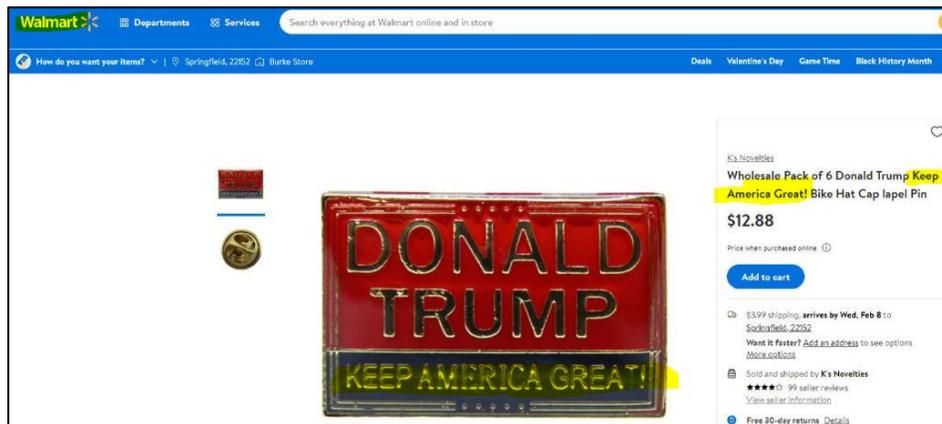


Id. at 75-77.

Like Applicant, some third-party vendors that are apparently unaffiliated with former President Trump or his campaigns offer KEEP AMERICA GREAT! ornamental pins and similar goods. For example, SC Products offers a 10-pack of “Trump Keep America Great 2024” buttons:

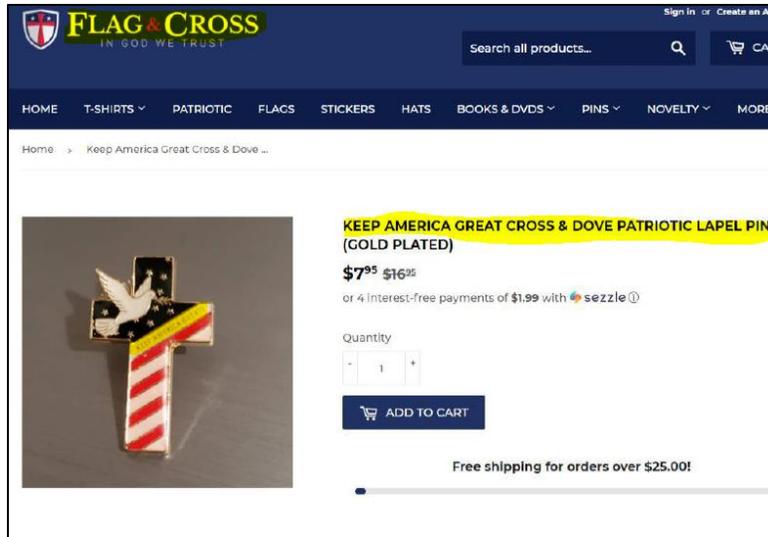


February 3, 2023 Denial of Request for Reconsideration TSDR 5 (highlighting added). Walmart offers a “wholesale pack” of “6 Donald Trump Keep America Great! Bike Hat Cap lapel pin”:

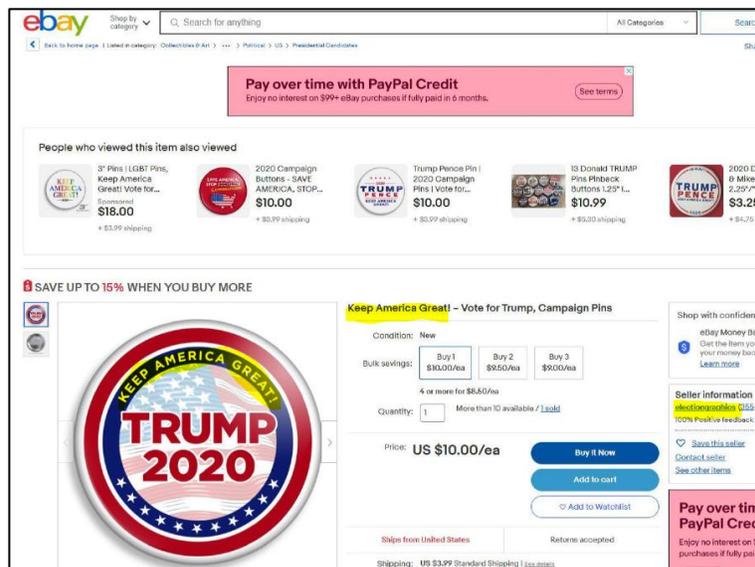


Id. at 12 (highlighting added). The offerings of multiple pins and buttons in “packs” by SC Products and Walmart suggests that these KEEP AMERICA GREAT products are somewhat popular, or at the very least worn in a variety of circumstances, and thus that an appreciable number of consumers have been exposed to the “KEEP AMERICA GREAT!” slogan on proudly displayed pins and buttons, not to mention a variety of other products that use the proposed mark ornamentally.

Flag & Cross offers a KEEP AMERICA GREAT cross and dove patriotic lapel pin:



Id. at 10 (highlighting added). The eBay seller “electiongraphics” offers “KEEP AMERICA GREAT!” campaign pins:



Id. at 29 (highlighting added). Teepublic offers a “KEEP AMERICA GREAT” pin and tote, both “Designed and Sold by Milaino” (who does not appear to be connected to former President Trump or his campaigns):



Id. at 32, 50 (highlighting added). eBay seller “tg-stuff” offers yet another design/style of KEEP AMERICA GREAT! campaign button:



Id. at 78 (highlighting added).

The diverse collection of buttons and pins (and other products), offered in inconsistent forms and styles, by apparently unrelated sellers/competitors, indicates that the proposed mark is widely used by many, without direction from former President Trump or his campaigns. Some third-party users appear to have primarily commercial motives, while others transmit political or cultural messages in connection with their offers for sale.

C. Applicant's Specimen and Evidence of Use

Applicant's October 2, 2017 specimen shows use of the proposed mark on the back of an ornamental pin, as shown below:



front



back

More than four years later, Applicant submitted a photograph of the back of one of its KEEP AMERICA GREAT! pins while prosecuting the involved application:



January 27, 2022 Office Action response TSDR 6.⁸ Applicant claims that this more-recently submitted photograph was used as a specimen in support of Applicant's

⁸ During prosecution, Applicant did not submit evidence in a typical form or manner. Rather, its evidence consists of photographs or screenshots embedded within Office Action responses, unaccompanied by declarations. Some of this evidence is merely an excerpt of a document,

uninvolved Registration No. 6541831 for the mark KAG!,⁹ and that “both ‘KAG!’ and ‘KEEP AMERICA GREAT’ indicate the source of” Applicant’s pins. *Id.*

Applicant also relies on a “screenshot that is an accurate reproduction of” part of a “State Department” filing “submitted by Applicant ... [that] is identified in the filing by the assumed name ‘KAG!’.” *Id.* at 7. As shown below, Applicant explained in the portion of the filing provided that “KAG!” is an “Acronym for Keep America Great”:

AMERICA IN HARMS WAY, LLC

16. FOREIGN ENTITIES ONLY: If applicable, the following name the entity agreed to use in New York

2. NEW YORK LAW FORMED OR AUTHORIZED UNDER (CHECK ONE)

<input type="checkbox"/> Business Corporation Law	<input checked="" type="checkbox"/> Limited Liability
<input type="checkbox"/> Education Law	<input type="checkbox"/> Not-For-Profit
<input type="checkbox"/> Insurance Law	<input type="checkbox"/> Revised Limited Liability
<input type="checkbox"/> Other (specify law)	

ASSUMED NAME
KAG!

3A. There is an English explanation. Acronym for Keep America Great.

4. PRINCIPAL PLACE OF BUSINESS IN NEW YORK STATE (MUST BE NUMBER AND STREET IF APPLICABLE)

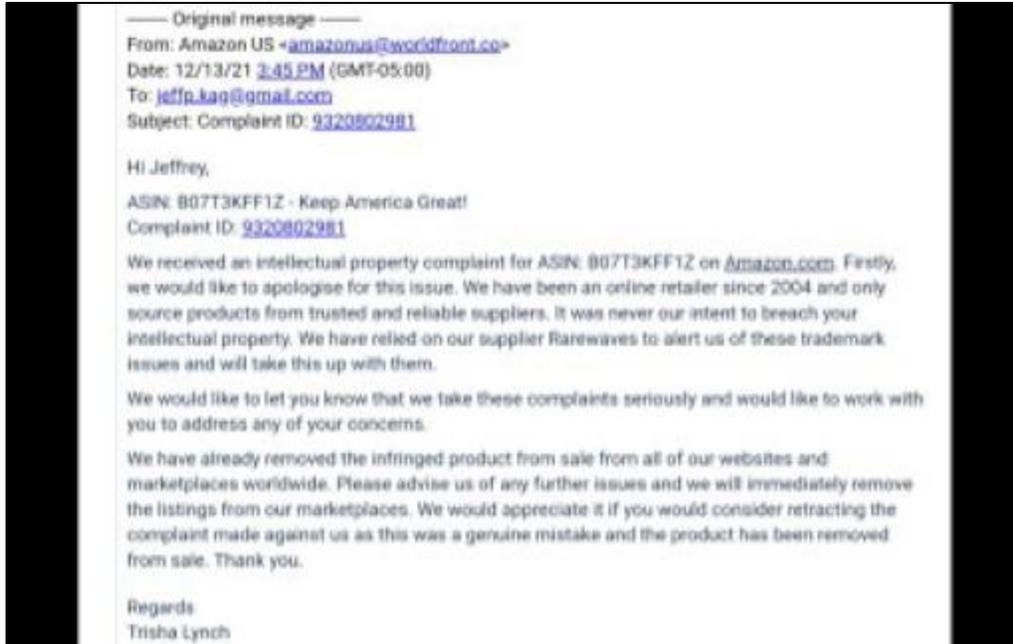
7528 State Route 41, Homer, NY 13077

Id.

Applicant registered its KAG! and KEEP AMERICA GREAT! “brands” with Amazon, and submitted at least portions of confirmations of the registrations from Amazon’s Brand Registry. *Id.* at 8. It also submitted the following correspondence arising out of Applicant’s “work with Amazon on enforcement”:

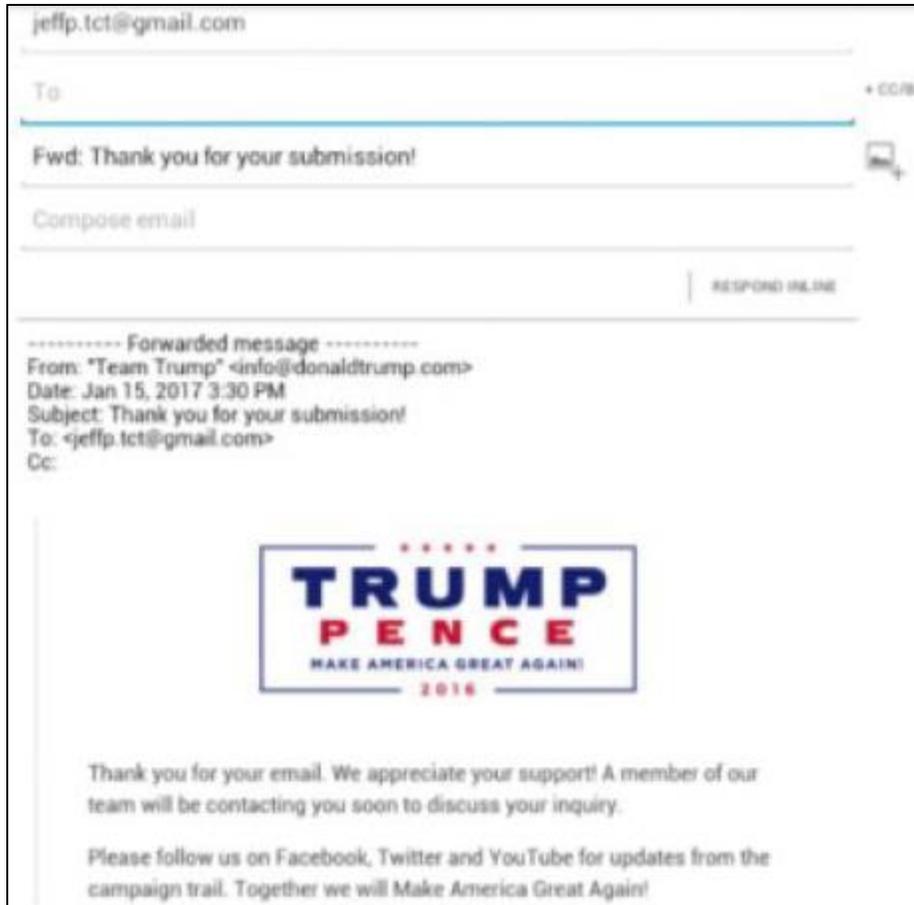
and thus the full context is not apparent. In any event, the Examining Attorney has not objected to any of Applicant’s timely evidence, and we have therefore considered it.

⁹ Applicant failed to make the registration of record.



Id. at 9. The correspondence shows that an alleged infringer of Applicant’s proposed KEEP AMERICA GREAT! mark agreed to remove allegedly infringing items from “all of our websites and marketplaces worldwide.” *Id.*

Applicant claims that it “conceived of the ‘Keep America Great!’ mark and shared the phrase with the Trump Pence Campaign” prior to January 18, 2017, and asserts that this is reflected in the following excerpt of an e-mail from the Trump Pence Campaign thanking “jeffp.tct@gmail.com” for an unidentified “submission” of some type:



Id. at 11.

III. Analysis

“The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we start our analysis with the Act’s definition of a trademark, which is “any word, name, symbol, or device, or any combination thereof – (1) used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C.

§ 1127. As the Supreme Court put it earlier this year, “whatever else it may do, a trademark is not a trademark unless it identifies a product’s source (this is a Nike) and distinguishes that source from others (not any other sneaker brand).” *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 2023 USPQ2d 677, at *4 (2023); *see also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached.”).

Whether the phrase KEEP AMERICA GREAT! falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s ornamental novelty pins, would perceive the phrase as identifying the source or origin of Applicant’s goods. *See, e.g., In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at *2 (Fed. Cir. 2022); *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998) (“A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public.”); *In re Safariland Hunting Corp.*, 24 USPQ2d 1380 (TTAB 1992). “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (citations omitted).

Here, Applicant’s specimens submitted in support of both the involved application and Applicant’s KAG! registration show that Applicant is attempting to use KEEP

AMERICA GREAT! as its trademark.¹⁰ In fact, the back of Applicant’s pins indicate that they are a “PRODUCT OF KEEP AMERICA GREAT!,” and the involved application indicates that “KEEP AMERICA GREAT!” is Applicant’s DBA. Thus, Applicant’s ornamental novelty pins purport to identify Applicant as their source.

However, “[m]ere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.” *In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993); *see also In re TracFone Wireless*, 2019 USPQ2d 222983, at *1; *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1152 (TTAB 2019) (“The mere fact that a phrase proposed for registration appears on the specimens of record does not establish its use as a service mark.”); *see generally Roux Labs, Inc. v. Clairol Inc.*, 427 F.2d 823, 66 USPQ 34, 39 (CCPA 1970) (“The mere fact that a combination of words or a slogan is adopted and used by a manufacturer with the intent Clairol has manifested here – does not necessarily mean that the slogan accomplishes that purpose in reality.”). Moreover, while the back of Applicant’s pins identifies them as a “PRODUCT OF KEEP AMERICA GREAT!” (Applicant’s DBA), that does not mean that “KEEP AMERICA GREAT!” serves as a source identifier. *See In re Hulting*, 107 USPQ2d 1175, 1180 (TTAB 2013) (“[A]s correctly explained by the examining attorney in her

¹⁰ Applicant’s reliance on its KAG! registration in support of registering the involved mark, 6 TTABVUE 11-15, is misplaced. That is a completely different mark, and there is no evidence that it is widely used or that an appreciable number of consumers associate it with KEEP AMERICA GREAT!. Applicant’s reference to owning a “family of marks” is a non sequitur. As explained below, priority is not an issue in this appeal and there is no evidence that KAG! and KEEP AMERICA GREAT! share a publicly-recognized “common characteristic.” *See e.g. J&J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *6-8 (TTAB 2020).

brief, ‘a change in the DBA or any ownership change has no bearing whatsoever on trademark entitlement in this or any application.’ Public knowledge of the name of the owner of an asserted mark is not the test for whether matter functions as a mark ... it remains true that products bearing the slogan ‘No More RINOs!’ come not just from applicant but from many sources.”).

Here, notwithstanding Applicant’s use of the proposed mark in connection with the identified goods and its intent that the phrase function as a mark, the record reveals that consumers would not perceive KEEP AMERICAN GREAT! as identifying the source of Applicant’s ornamental novelty pins. Rather, because the phrase is used by so many vendors and other third parties, including ornamentally on many products, it does not identify any particular source or product. Indeed, the phrase is so widely used, known and perceived as an expression of support for former President Trump, his campaigns and his agenda, that consumers would perceive it as just that, a supportive message. When a message is so widely used by third parties, including for products that display the message ornamentally, it cannot identify any particular vendor, source or Trump supporter.

A. The Proposed Mark Conveys Political and Cultural Messages Rather than the Source of Applicant’s Products

It should not be surprising that KEEP AMERICA GREAT! is perceived as conveying information about, and support for, former President Trump and his policies, because it was used as his campaign slogan. In fact, before former President Trump launched his reelection campaign, the slogan had “already become a fixture at Trump rallies.” August 2, 2021 Office Action TSDR 5. We can infer from its use as

a major party presidential candidate's campaign slogan, and from being a "fixture" at political rallies, that a large number of American consumers have been exposed to the term as a political message, rather than a trademark.

The slogan was so popular and so associated with former President Trump that his main opponent in the 2020 presidential election acquired the "keepamericagreat.com" domain name as a platform for contrasting the two candidates. *Id.* at 8-10. Candidates for lower office also used the proposed mark to convey their support for what the Examining Attorney refers to as former President Trump's "ideas" and "ideals." February 25, 2022 Office Action TSDR 18. As a result of these uses of "KEEP AMERICA GREAT!," the phrase, like "MAKE AMERICA GREAT AGAIN" before it, has been used to describe not just former President Trump and other politicians, but also their like-minded supporters and political events. *See* February 3, 2023 Denial of Request for Reconsideration TSDR 56.

Under these circumstances, the phrase is not capable of functioning as a source identifier. Indeed, political campaigns and movements are exercises in bringing people and groups together for a common, typically non-commercial purpose, sometimes advanced through slogans and other advocacy. Here there is no indication in the record that former President Trump or his campaigns seek to control use of the proposed mark. To the contrary, the record reveals that a wide variety of Trump supporters use the proposed mark in a wide variety of ways. Even some who seek to profit from the phrase also use it to advance political beliefs.

In fact, some listings of products that display the proposed mark ornamentally encourage shoppers to support former President Trump, or make political or cultural points in addition to describing and offering specific KEEP AMERICA GREAT! products. *See e.g.*, August 2, 2021 Office Action TSDR 12 (“[S]how your support! Help President Trump get re-elected in 2020”); February 3, 2023 Denial of Request for Reconsideration TSDR 30 (“Show your support for President Trump 2020 campaign. Vote for DONALD TRUMP and MIKE PENCE on November 3, 2020!”) and 37 (“All of our products seek to express that world view to all those who shop on our store.”). “Matter that is widely used to convey ... social, political ... or similar informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark.” *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020).

The record shows that many consumers of ornamental novelty pins and related products have been exposed to the slogan KEEP AMERICA GREAT! as a political message rather than an identification of source. Not only have major news outlets such as POLITICO, the WASHINGTON POST, CBS News and CNN reported on KEEP AMERICA GREAT! as a political slogan rather than a trademark, but a banner bearing the proposed mark received more than 11,000 ratings on Amazon, and KEEP AMERICA GREAT! products have received over 19,000 reviews on Etsy. February 28, 2018 Office Action TSDR 9-16; August 2, 2021 Office Action TSDR 5-36. We can safely infer that each purchase of a product that displays KEEP AMERICA GREAT! ornamentally results in multiple consumer exposures to the phrase, because these

products are meant to be displayed to others, such as on banners, buttons and the front of t-shirts. The Camille & Haley KEEP AMERICA GREAT “official music video” received 1.2 million views and almost 16,000 comments on YouTube. February 3, 2023 Denial of Request for Reconsideration TSDR 55. Thus, the consuming public has been exposed to KEEP AMERICA GREAT! not as an identifier of source, but instead as a political slogan.

Put simply, when consumers are exposed to so many different sources of “KEEP AMERICA GREAT!” hats, stickers, pins, buttons, songs, flags, clothes, signs and other products, the phrase cannot identify any particular source of these goods. The phrase is instead a political and cultural message, used by people who share political and cultural views to affiliate themselves with, and promote, former President Trump and his beliefs.

The record evidence shows that consumers are accustomed to seeing the phrase “No More RINOs![”] displayed on bumper stickers, t-shirts, novelty pins and other items from many different sources. As a result, consumers will not perceive this wording as applied to applicant's goods as a source indicator pointing uniquely to applicant. Rather, consumers purchasing applicant's goods will perceive applicant's proposed mark as a political slogan commonly used by multiple individuals and entities rather than a sole source of products or services.

In re Hulting, 107 USPQ2d at 1177. *See also In re Team Jesus*, 2020 USPQ2d 11489, at *5-6 (affirming failure to function refusal of TEAM JESUS for clothing in part because the clothing is “presumably offered for consumers who want to convey their Christian affiliation by wearing apparel that prominently proclaims that message”); *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at * 6 (TTAB 2020) (“some widely-

used messages are primarily understood as an expression of enthusiasm or affection for, or affiliation with, a person, place or thing, and when that is how consumers perceive them they are not functioning as terms or symbols that identify and distinguish goods or services in commerce and indicate their source”).

B. The Proposed Mark’s Widespread Use By Third Parties Is Enough By Itself to Establish that the Phrase Does Not Function as a Mark

Even if we were to ignore the proposed mark’s use as a political slogan and message, its widespread and typically ornamental use by third parties for flags, buttons, clothing, songs and other products is by itself a sufficient basis to find that it fails to function as a trademark. Widely used phrases such as KEEP AMERICA GREAT! often fail to function as trademarks. *In re Wal-Mart*, 129 USPQ2d at 1153 (widespread third party use of a phrase “makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark”); *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (due to “ubiquity” of **I ♥ DC**, “it does not create the commercial impression of a source indicator, even when displayed on a hangtag or label”); *In re Hulting*, 107 USPQ2d at 1177 (“The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.”) (quoting *In re Eagle Crest*, 96 USPQ2d at 1229)); *In re Volvo Cars*, 46 USPQ2d at 1459 (DRIVE SAFELY is merely “an everyday, commonplace safety admonition”); *Reed v. Amoco Oil Co.*, 611 F.Supp. 9, 225 USPQ 876, 877 (M.D. Tenn. 1984) (“[C]ourts are reluctant to allow one to obtain monopoly rights to the use of a common word or phrase.... The more common

a phrase is, the more it appears in everyday parlance, less is the likelihood that the phrase identifies the source of a certain product, and less is the likelihood that it deserves trademark protection”). Here, as in these “widespread use” cases, the proposed mark is too commonly used by too many third parties in a variety of forms for it to identify the source of Applicant’s ornamental novelty pins.

In addition to being widely used, KEEP AMERICA GREAT! is quite often used ornamentally, in large, prominent letters on the front of buttons, flags, shirts and other goods, to convey a specific message, but not to identify the source of the goods. In fact, the record reveals that the phrase was often used to promote former President Trump’s reelection campaign, rather than to identify the sources of the KEEP AMERICA GREAT! products (those sources include “HomeDecorByAnatasia,” “BankHaus,” “thetowncompany,” “EuiStudio,” “PatriotTribe,” “ITrumpUSA,” “CreationsByTatumGear” and “KickAce,” among many others). This common ornamental use of the phrase influences public perception of the phrase and its purpose, which in this case is to convey support for former President Trump and his policies. *In re Team Jesus*, 2020 USPQ2d 11489, at * 5-6; *Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *4 (TTAB 2020) (“in the clothing industry, this common message is used on t-shirts as a feature such that ‘the display itself is an important component of the product and customers purchase the product’ not associating it with a particular source but because of the message”) (citing *D.C. One Wholesaler*, 120 USPQ2d at 1716); *In re Hulting*, 107 USPQ2d at 1178-79 (“Clearly, the placement, size, and dominance of the wording are consistent with informational (or

ornamental), not trademark use. Such prominence is more consistent with the conveying of an informational message than with signifying a brand or an indicator of source.”).¹¹

C. Applicant’s “Priority” Argument Is Irrelevant

Even if Applicant is correct that “it is the first party to use the ‘KEEP AMERICA GREAT!’ mark in commerce,” 11 TTABVUE 4, that would be irrelevant. The problem is that the phrase does not function as a mark, and therefore it cannot be protected as such, no matter when it was first used, or by whom. This is clear from analogous cases involving different species of the broader “failure to function” genus. *Cf. KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (discussing the “undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first”); *In re Bailey Meter Co.*, 102 F.2d 843, 41 USPQ2d 275, 276 (CCPA 1939) (“The fact that appellant may have been the first and only one to adopt and use the mark sought to be registered does not prove that the mark is not descriptive.”); *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1549 (TTAB 2017) (refusing registration of generic term “COFFEE FLOUR” despite applicant being the term’s first and only user); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010) (“that an applicant may be

¹¹ There is no evidence that anyone, much less an appreciable fraction of the consuming public, is aware of Applicant’s “State Department” filing, submission to the Trump/Pence campaign or Amazon brand registration. There is no evidence that Applicant’s single successful enforcement effort reflects anything about the general public’s perception of KEEP AMERICA GREAT!

the first or only user of a generic designation . . . does not justify registration if the only significance conveyed by the term is that of the category of goods”).

As the Examining Attorney points out, “[e]ligibility for registration must be determined on the basis of the facts and evidence in the record at the time registration is sought . . .” 10 TTABVUE 15. *In re Morton-Norwich Prods. Inc.* 671 F.2d 1332, 213 USPQ 9, 18 (CCPA 1982) (“trademark rights are not static . . . the right to register must be determined on the basis of the factual situation as of the time when registration is being sought”); *see also In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“the proper time for measuring inherent distinctiveness is at the time of registration”); *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732 (CCPA 1969). Thus, we have routinely refused registration of marks that fail to function as such, based on evidence that post-dates the application’s filing date or the mark’s claimed date of first use. *See e.g., In re Team Jesus*, 2020 USPQ2d 11489, at ** 1, 4 & n.1, 4-6; *In re Vox Populi Registry Ltd.*, 2020 USPQ2d 11289, at *6 & n.41-43 (TTAB 2020), *aff’d* 25 F.4th 1348, 2022 USPQ2d 115 (Fed. Cir. 2022); *In re Texas With Love*, 2020 USPQ2d 11290, at *1 & n.1.¹²

IV. Conclusion

The record shows that the phrase KEEP AMERICA GREAT! is a political and cultural message, one that is too commonly used, often ornamentally, in connection with novelty pins and other products for it to be perceived as a trademark. Applicant

¹² Applicant’s reliance on the USPTO’s treatment of allegedly analogous applications is misplaced. *Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *4-5; *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at * 8 & n.10.

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should not be able to deny competitors (who according to the record also use the phrase) the right to use it freely. *See In re Volvo Cars*, 46 USPQ2d at 1460 (“to grant exclusive rights to applicant in this ordinary and commonly used safety admonition would interfere with the rights of others in the automobile industry to freely use the familiar phrase” to promote safe driving); *In re Schwauss*, 217 USPQ 361, 362 (TTAB 1983); *America Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 57 USPQ2d 1902, 1910-11 (4th Cir. 2001) (widespread use of “You Have Mail” in connection with an email service could not be protected as a trademark where consumers would perceive it “in its commonly understood way”).

Decision: The refusal to register the proposed mark KEEP AMERICA GREAT! on the ground that it does not function as a mark is affirmed.